IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 402 of 1996

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AMINABAI ABDULSHAKUR CHAKI

Versus

STATE OF GUJARAT

Appearance:

(MR PB MAJMUDAR) for Petitioner
MR ST MEHTA APP for Respondent No. 1
MR BD KARIA for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 25/09/2000

ORAL JUDGEMENT

This Revision Application under section 397 CRPC has been preferred by the applicant-wife against the judgment and order dated 3rd October, 1996, passed by the learned Additional Sessions Judge, Jamnagar, in Criminal

Revision Application No. 179/94.

The petitioner herein is the estranged/divorced wife of the opponent no.2 (hereinafter referred to as 'the opponent'). The facts undisputed are - The petitioner and the opponent were married according to Muslim Shariyat, and during the wedlock, minor sons - the applicants nos. 2 and 3 before the learned Magistrate were born to them. It is the claim of the petitioner that after the birth of the two sons, she was compelled to leave her matrimonial house on account of physical and mental cruelty meted out to her and that the opponent had neglected to maintain the applicant. The opponent claimed that he had validly divorced the petitioner according to Muslim Shariyat.

The petitioner and the minor sons filed Criminal Misc. Application No. 191/92 in the court of the learned Judicial Magistrate, First Class, Khambhalia, and claimed maintenance from the opponent. It was proved that the opponent was serving as a Senior Clerk in the Panchayat office and was earning a take-home monthly salary of Rs. 2547/-. The learned Magistrate by his judgment and order dated 7th October, 1994, partially allowed the application. The petitioner was awarded a monthly maintenance of Rs.125/- from the date of the order and the minor sons were awarded monthly maintenance of Rs. 100/- each from the date of the order. Feeling aggrieved, the petitioner preferred Criminal Revision Application No. 157/94, and the opponent preferred the Criminal Revision Application No. 179/94 before the learned Sessions Judge, Jamnagar. The learned Additional Sessions Judge, Jamnagar, by his judgment and order dated 3rd October, 1996, allowed the Criminal Revision Application No. 157/94. The monthly maintenance to the two minor sons was enhanced to Rs.200/- each and was ordered to be paid from the date of the application. In Revision Application No. 179/94, the opponent did not challenge the maintenance awarded to the two minor sons, however, he disputed his liability to pay maintenance to the petitioner-wife. He claimed that he had validly divorced the petitioner and she had ceased to be the lawfully wedded wife of the opponent. She, therefore, was not entitled to maintenance under section 125 CRPC. The only remedy which was open to the petitioner was under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as 'the Act of 1986'). The learned Additional Sessions Judge after considering the evidence on record held that the opponent had validly divorced the petitioner and the said divorce had become effective. He further held that after the divorce, the

petitioner had no right to claim maintenance under section 125 CRPC and the only remedy which she could have availed of, was under the Act of 1986. Unless both the parties agreed to be governed by the provisions of sections 125 to 128 CRPC as envisaged under section 5 of the Act of 1986, the said provisions can not be invoked. He, therefore, quashed and set aside the order of maintenance made by the learned Magistrate in favour of the petitioner. Feeling aggrieved, the petitioner has preferred the present Revision Application.

Two questions arise for my consideration. First, whether the opponent had validly divorced the petitioner; and second, whether the application for maintenance made under section 125 CRPC by the petitioner was maintainable. In the matter of KULSUMBEN ADAMBHAI VS NOORMOHMAD PIRBHAI (CRIMINAL REVISION APPLICATION NO. 326/92, DECIDED ON 12TH SEPTEMBER 2000), I have taken a view that the Act of 1986 does not oust the jurisdiction of the learned Magistrate to award maintenance to a divorced Muslim woman under section 125 CRPC. The provisions contained in section 5 of the Act of 1986 would be attracted only in case where the application for maintenance has been made under section 3 of the Act of 1986, that is to say, after introduction of the Act of 1986, a Muslim woman can claim maintenance either under section 3 (2) of the Act of 1986 or under section 125 CRPC. Such woman shall have a liberty to choose either of the remedies which may suit her the best. Hence, in the present case, the application for maintenance made by the petitioner under section 125 CRPC was maintainable. In my view, the learned Additional Sessions Judge was not right in holding that after introduction of the Act of 1986, application for maintenance under section 125 CRPC at the instance of a divorced Muslim woman is not maintainable. The learned Additional Sessions Judge has thus erred in rejecting the application made by the petitioner herein. In above view of the matter, whether the petitioner is still wedded to the opponent or not, she would be entitled to claim maintenance under section 125 CRPC. It is, therefore, not necessary for me to decide whether the applicant was validly divorced by the opponent or not. I, therefore, do not decide the said issue.

In the result, this Revision Application is allowed. The judgment and order of the learned Additional Sessions Judge, Jamnagar, dated 3rd October, 1996, passed in Criminal Revision Application No. 179/94 is quashed and set aside. The judgment and order dated 7th October, 1994, of the learned Judicial Magistrate,

First Class, Khambhalia, passed in Misc. Criminal Application No. 191/92 is restored. The opponent-respondent no.2 shall pay the monthly maintenance regularly to the petitioner commencing from 1st November, 2000. He shall also deposit the amount of arrears of maintenance till 31st October 2000 with the trial court by 1st January, 2001. On such amount being deposited, the applicant shall be entitled to withdraw the same. Rule is made absolute in above terms.

(MS R.M.DOSHIT J)

JOSHI